

No. 21941 ✓

See file
3403

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STRUCTURAL LAMINATES, INC., a
corporation,

Appellant,

v.

AUG 14 1968

DOUGLAS FIR PLYWOOD ASSOCIATION,
a corporation,

Appellee,

PETITION FOR REHEARING OF APPELLANT,
STRUCTURAL LAMINATES, INC.

HONORABLE RUSSELL E. SMITH, Judge

FILED

MAUTZ, SOUTHER, SPAULDING, KINSEY
& WILLIAMSON

AUG 5 1968

LEE JOHNSON

THOMAS M. TRIPLETT

WM. B. LUCK, CLERK

1200 Standard Plaza, Portland, Oregon 97204

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STRUCTURAL LAMINATES, INC., a
corporation,

Appellant,

v.

DOUGLAS FIR PLYWOOD ASSOCIATION,
a corporation,

Appellee.

PETITION FOR REHEARING OF APPELLANT,
STRUCTURAL LAMINATES, INC.

HONORABLE RUSSELL E. SMITH, Judge

Appellant, Structural Laminates, Inc. petitions
he Court for rehearing upon the ground that the court erred
n affirming the decree in favor of the Douglas Fir Plywood
ssociation.

The opinion of the court (Op 2) states that it is
nnecessary for Structural Laminates to plead or establish

that the defendant acted with a bad purpose. The court suggests that both the existence of a conspiracy and the reasonableness of the appellee's conduct and the resulting restraint of trade may be established without evidence of motive or intent. Appellant readily agrees with this determination of the court.

This decision, however, points out the inconsistency of the trial court's findings. The court stated:

"Absent a bad purpose, what was defendant's anti-trust liability? It was responsible for the commercial standards which did effect adversely the marketing of plaintiff's product. Plaintiff's 3-ply 1/2" was suitable for inclusion in the commercial standards, but 3-ply 1/2" plywood did bear a poor reputation in the industry in 1958. Had defendant been vigilant, it might have concluded in 1958, or sooner, what it did conclude in 1962--that the bad reputation was unjustified.

If intent and purpose are factors in the anti-trust law, and the court believes they are except where per se violations are involved, then the mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade.* * * The court is of the opinion that in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to anti-trust liability. (Opinion, record 289-290) (emphasis added)

It is quite clear from the trial judge's opinion that the Douglas Fir Plywood Association was negligent in its failure to include three ply one-half inch construction within the industry standards. The evidence, together with his findings, confirm this conclusion.

Negligence consists of what? It is the failure of an individual or group to act in a reasonably prudent manner under all of the circumstances then and there existing. It is thus clear that the conduct of the defendant was unreasonable vis-a-vis Structural Laminates.

The trial court's opinion and the decision of this court suggest that the conduct and restraint were reasonable. This finding and conclusion cannot be squared with the established fact of appellee's negligence.

The basic question raised is whether negligence by a trade association in formulating standards which drastically limit the marketability of a product gives rise to an anti-trust violation. Only in the event that the court finds that such negligence does not give rise to an anti-trust violation, can the various findings of the trial court be made consistent.

CONCLUSION

The judgment in favor of Appellee, Douglas Fir Plywood Association should be reversed.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON

By: Lee Johnson and
Thomas M. Triplett
Attorneys for Appellant,
Structural laminates, Inc.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this petition, I have examined Rule 40 of the Federal Rules of Appellate Procedure, which were made applicable to the United States Court of Appeals for the Ninth Court, effective July 1, 1968, and that, in my opinion, the foregoing petition is in full compliance with that rule. I further certify that this petition is in my judgment well founded and is not interposed for delay.

By Thomas M. Triplett
Thomas M. Triplett
Of Attorneys for Petitioner,
Structural Laminates, Inc.

